

FILED

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARTIN BINMON AVERY,

Defendant.

No. 12-618 CW (DMR)

DETENTION ORDER

I. BACKGROUND AND INTRODUCTION

Defendant Martin Binmon Avery is charged in an indictment with violations of 18 U.S.C. §§ 2252(a)(2) and (a)(4)(B) (possession and distribution of child pornography).

Mr. Avery made his initial appearance on October 29, 2012. At that time, the United States moved for his detention pursuant to the Bail Reform Act and asked for a hearing as permitted by 18 U.S.C. § 3142(f). Pretrial Services prepared a full bail study, which recommended Mr. Avery's detention based on its belief that the court could not impose a combination of release conditions to reasonably mitigate the risk of flight and danger to the community. The court held a detention hearing on November 6, 2012, at which each side was given the opportunity to make their proffers to the court. Having fully considered the matter, the court orders that Mr. Avery be detained.

II. LEGAL ANALYSIS

The Bail Reform Act requires that in a pretrial posture, the government bears the burden

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1 of proving that a defendant poses a risk of flight and/or a danger to the community that cannot be
2 mitigated through the imposition of conditions of release. If the government does not meet its
3 burden, the Court's duty is to fashion appropriate conditions that permit the defendant to remain
4 out of custody during the preparation of his or her defense, while safeguarding against flight or
5 community danger. Close cases should result in release "[t]o give effect to the principle that
6 doubts regarding the propriety of release be resolved in favor of the defendant." *United States v.*
7 *Chen*, 820 F. Supp. 1205, 1208 (N.D. Cal. 1992) (Walker, J.) (citing *United States v. Motamedi*,
8 767 F.2d 1403, 1405-06 (9th Cir. 1985)).

9 A person facing trial generally shall be released if some "condition, or combination of
10 conditions . . . [can] reasonably assure the appearance of the person as required and the safety of
11 any other person and the community." 18 U.S.C. § 3142(c). In non-capital cases, the court
12 should deny pretrial release "only in rare circumstances." *Motamedi*, 767 F.2d 1403 at 1405
13 (citations omitted); *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) (upholding
14 constitutionality of Bail Reform Act) ("In our society liberty is the norm, and detention prior to
15 trial or without trial is the carefully limited exception.").

16 The court must order a defendant detained if it finds that it cannot fashion conditions to
17 assure the defendant's appearance in court or the safety of the community or another person. 18
18 U.S.C. § 3142(e)(1). The government bears the burden of proof on either prong. To prove that
19 no condition or combination of conditions can assure that the accused will appear at required
20 court hearings, the government must show by a preponderance of the evidence that the accused is
21 a flight risk. *United States v. Aitken*, 898 F.2d 104, 107 (9th Cir. 1990) (citing *Motamedi*, 767
22 F.2d at 1406). The government must prove that the defendant poses a non-mitigable danger to
23 the community through clear and convincing evidence. *Id.* (citing *Motamedi*, 767 F.2d at 1406).

24 For certain charged offenses, including drug crimes with a maximum prison term of at
25 least ten years, "[s]ubject to rebuttal by the person, it shall be presumed that no condition or
26 combination of conditions will reasonably assure the appearance of the person . . . and the safety
27 of the community." 18 U.S.C. § 3142(e)(3). The presumption shifts a burden of production to a
28 defendant, but the burden of persuasion remains with the government. *United States v. Hir*, 517

1 F.3d 1081, 1086 (9th Cir. 2008). The presumption is not erased when a defendant proffers
2 rebutting evidence; “rather, the presumption ‘remains in the case as an evidentiary finding
3 militating against release, to be weighed along with’” the other relevant evidence. *Id.* (citation
4 omitted).

5 Bail hearings generally proceed by proffer, and the rules of evidence do not apply. 18
6 U.S.C. § 3142(f)(2). At the hearing, the court determines whether any conditions in section
7 3142(c) will reasonably assure the defendant’s appearance and the safety of the community or
8 another person. *Id.* The Bail Reform Act “mandates release of a person facing trial under the
9 least restrictive condition or combination of conditions that will reasonably assure the appearance
10 of the person as required.” *Motamedi*, 767 F.2d at 1405 (citations omitted).

11 In evaluating whether pretrial release is appropriate, a court must consider (1) the nature
12 and circumstances of the offense, (2) the weight of the evidence, (3) the history and
13 characteristics of the person (including his character, physical and mental condition, family ties,
14 employment, financial resources, length of residence in the community, community ties, past
15 conduct, history relating to drug and alcohol abuse, criminal history, or record concerning
16 appearance at court proceedings), and (4) the nature and seriousness of the danger to any person
17 or the community posed by the person’s release. 18 U.S.C. § 3142(g); *Motamedi*, 767 F.2d at
18 1407.

19 Mr. Avery has been charged with one count of possession, and two counts of distribution
20 of child pornography. He is 46 years old and lives with his mother, for whom he is the primary
21 caregiver. He has lived in Northern California his entire life, except for one year that he spent in
22 Texas. Mr. Avery has been divorced since 1997. He has two children, neither of whom live with
23 him. He has been unemployed since March 2012, and had sporadic self-employment since 1992.
24 He was not able to identify any potential sureties.

25 Mr. Avery is a registered sex offender. He sustained a misdemeanor conviction in 1999
26 for “annoying/molesting children.” He has a 2007 conviction for reckless driving, and a 2009
27 conviction for driving under the influence of drug or alcohol. His criminal history also indicates
28 that he has failed to make court appearances at least twice, and that he sustained revocations of

1 probation in 1999 and 2009. He is a daily methamphetamine user and also regularly uses
2 marijuana. He admitted to being a heavy alcohol user until three years ago, and to have used
3 cocaine in the past. His sister reports that he has used ecstasy and GHB. With respect to mental
4 health, Mr. Avery stated that he has never received treatment for any emotional or psychiatric
5 problems. However, his family members report concerns about his mental health. Mr. Avery
6 has resisted their past recommendations that he engage in mental health counseling. His mother
7 and sister both report that Mr. Avery has vocalized suicidal thoughts, as recently as six months
8 ago.

9 Viewing the record as a whole, the court finds that the government has met its burden of
10 establishing that Mr. Avery presents a risk of danger to the community, as well as a serious risk
11 of flight, that the court cannot mitigate through the imposition of reasonable conditions. Of
12 greatest concern is Mr. Avery's history of long-standing polysubstance abuse, untreated mental
13 health issues, some indication of resistance to counseling, and concerns about self-harm and self-
14 destructive behavior. In addition, Mr. Avery's status as a registered sex offender automatically
15 disqualifies him from placement in available residential treatment facilities. Finally, Mr. Avery
16 was unable to identify any sureties to help guarantee his compliance with release terms.

17 The court therefore detains Mr. Avery. He shall remain committed to the custody of the
18 Attorney General for confinement in a corrections facility separate, to the extent practicable,
19 from persons awaiting or serving sentences or being held in custody pending appeal. Defendant
20 shall be afforded reasonable opportunity for private consultation with counsel. On order of a
21 court of the United States or on request of an attorney for the government, the person in charge of
22 the corrections facility in which Defendant is confined shall deliver Defendant to a United States
23 marshal for the purpose of an appearance in connection with a court proceeding.

24 IT IS SO ORDERED.

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26 DATED: November 6, 2012

27 
28 DONNA M. RYU
United States Magistrate Judge